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NOTES OF INDIAN CASES.

ANANDILAL BHAGCHAND *v.* CHANDRA BAI, I. L. R. 48 Bom. 203.

This decision is useful as an attempt to define the limits of a concubine's right of maintenance under the Hindu Law on the death of her paramour, whose connection with her was adulterous. In *Bai Monghibai* v. *Bai Nagubai* (1) the same learned Judges held that to entitle a woman to claim maintenance against those who take the assets of her paramour, it should be made out that she was living permanently with her paramour, openly and as a member of his household till his death. On the facts of that case, the learned Judges held that where the woman was living in another house and was faithful to the deceased and kept by him till his death, there was no obligation on the surviving members of the family to maintain her as she did not answer to the description of an *avaruddha stree* which has been explained as indicating a woman who has been prohibited from intercourse with other men with an injunction to stay at home with the object of avoiding any lapse of service. We must say that these requisites have not been laid down in terms in the cases as essential, although the learned Judges do not find anything inconsistent in the decisions. If this exposition of the law is correct, it seems doubtful whether a woman whose husband is alive or even a widow, when she is kept by another person can properly be described as an *avaruddha stree* because she would ordinarily be bound to live with her husband or her husband's relations and it would be illegal for her to live outside for an improper purpose. It may however be suggested that the test of an *avaruddha stree* is whether she was kept under such control by the paramour rather than whether she was under such legal obligation.

1. (1922) I L R 47 B 401.

The passages in the Mitakshara relied on in the cases make it quite clear that those who take the estate of a deceased person should provide for the maintenance of his mistresses, though it is not clear on what principle this obligation is based. Cf. *Ramanarasu* v. *Buchamma* (1). In the same case, after a very full argument, it was held that it has no relation to the obligation of a man to support his own wife and that a paramour was not under a liability to support his concubine although she may continue to be faithful to him. To entitle her to claim maintenance against those who take the estate of her paramour, she stands on no higher footing than a widow and is under a continued obligation of chastity. *Yashwantrav* v. *Kashibai* (2).

In the case under notice, the husband of the concubine was alive at the date of the suit; and the learned Judges therefore held that the concubine had no right to claim maintenance against those who took her paramour's estate, as she had at the same time a right to be maintained by her husband if she was willing to return to him though she was entitled only to a starving maintenance as it is called and as the obligation of the chastity to her paramour would be inconsistent with her duty to her husband. The weight of authority apparently compelled the learned Judges to take the view that though the connection of the deceased with a concubine was adulterous, there is an obligation to maintain her. The obligation is however restricted in their opinion to cases where the husband of the concubine predeceased her husband. If we may say so with respect, the decision in the case under notice is the only one consistent with principle though it may not be quite reconcilable with some of the decisions referred to. We may perhaps observe that the decision of the Madras High Court in *Sikki* v. *Venkatasamy Goundan* (3) to some extent supports the view of the learned Judges in this case.

NARASINGERJI *v.* PARTHASARADHI, I L R 47 M. 729 (P. C.)

This case marks a new tendency the beginning of which you notice in *Maung Kyin* v. *Ma Shwe La* (4) which while

1. (1899) I L R 23 M 282.
2. (1887) I L R 12 B 26.
3. (1875) 8 M H C R 144.
4. (1917) I L R 45 C 320 (P C).

affirming the most extreme of the views of S. 92 of the Evidence Act which prevailed in India and formally repudiating the English practice of permitting evidence on the ground of fraud, introduced ideas of fraud and trust into such questions which in effect upset those conclusions and this decision marks a further step in that it introduces an element of doubt on the very point *Maung Kyin* v. *Ma Shwe La* (1) accepts as settled law. This is in accordance with what has taken place with respect to the provisions of the Transfer of Property Act and Registration Act with reference to the equity doctrine of part-performance. On the rulings as they stand, it is not open under the Indian Law to give evidence to show what the intention of the parties is, but there is nothing to prevent evidence being given to show that a trust was intended and the vendee accepted the transfer on that footing. [*See* S. 5 of the Trusts Act and the analogous case of *Kunha* v. *Coelho* (2)]. *Maung Kyin* v. *Ma Shwe La* (1) seems to proceed upon such a footing although there is a suggestion that as between original parties, such evidence was not permissible. In *Rochefoucauld* v. *Bousted* (3) it is suggested that relief might be given on two footings in such cases. First, evidence might be given as to the true intention on the ground of fraud as understood in cases under the Statute of Frauds. Secondly, from the actings, a trust might be inferred. The first ground of relief might not be available in India but there is nothing to preclude, as we have said above, relief on ground No. 2. The evidence that might be sufficient for relief on ground No. 1 might not be sufficient for relief under ground No. 2 but it is all a matter for a little *legerdemain* in pleading and evidence which under encouragement can be easily provided on materials not quite different from those required under ground No. 1. Both in *Maung Kyin* v. *Ma Shwe La* (1) and *Rochefoucauld* v. *Bousted* (3) there was a sale deed and nothing else, but in the case under review and in ordinary cases in India, there is always a sale deed and an agreement to re-convey. To graft a trust on such an arrangement is more difficult than on a sale *simpliciter*. But in any case, it is clear that on such a theory, a transferee *bona fide* without notice of the trust will be protected.

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1. (1917) I L R 45 C 320 (P C).
2. (1908) I L R 31 M 187.
3. (1897) 1 Ch 196.

Their Lordships had not to decide the general question in this case for they decided it on the construction of the deeds in question. It was an ostensible sale and an agreement for re-conveyance and as their Lordships point out the parties took great pains to maintain the ostensible character. Nevertheless, their Lordships saw enough to justify the conclusion that a mortgage was intended. The circumstances that weighed with them were : (1) gross inadequacy of price and absence of proof of negotiations for settling the price; (2) the fact that the agreement to re-convey was not a mere one-sided arrangement conferring an option but a mutual agreement to purchase and to re-convey which gave the vendee power to enforce payment ; (3) reservation of mineral rights ; and lastly, (4) a provision against the contingency of any portion of the land being acquired by the Government which showed that time was not intended to be of the essence of the transaction. But for the overshadowing sense of the inadequacy of price, one is extremely doubtful if any Court would have thought these provisions were indications of a mortgage and not of a genuine agreement to sell. As we said, this decision marks a new tendency and has really to be understood in that light.

NAGENDRA BALA DASI *v.* DINANATH, I. L. R. 51 Cal. 299 : 46 M. L. J. 532 (P. C.).

This decision indicates the full length of the disability of a pleader purchasing the subject-matter of the litigation in which he acted for one of the parties, and we are not sure whether it has not gone beyond the decisions on the subject have taken us hitherto. The pleader was engaged for the mortgagor in a suit on a mortgage. The suit ended in a compromise decree and his engagement ceased. Years after, when another pleader is acting for the judgment-debtor, the guardian pleader purchases the unexecuted portion of the decree from the decree-holder in the name of his wife. The execution is further proceeded with and the mortgaged properties are brought to sale and purchased in a public auction in execution by the former pleader in the name of his wife after she obtains leave to bid at the sale. It is significant that it was not suggested that in purchasing the properties any knowledge which he might have obtained as pleader was utilised and still the pleader was held bound to hold the profit he might have made in buying the decree and the immoveable properties purchased in execution for the benefit of his former client. The ground of their Lordships' decision is the secrecy in putting forward the name of his wife as the purchaser of the decree and the properties. We venture to think that secrecy can be construed as an element of unfair dealing only when there is a subsisting fiduciary relation between the pleader and the client as found was to exist in *Lewis* v. *Hillman* (1) and *McPherson* v. *Watt* (2). When that relation ceased to exist long ago and furthermore when another pleader was acting for the former client about whom there was no suggestion that he was not in full possession of the facts and circumstances of the case, it is difficult to see how the fiduciary obligation could still attach to the former pleader. Cf. *Pisani* v. *Attorney-General for Gibraltar* (3). Cases in England have made it clear that even a gift by a client to his solicitor will be supported when the relationship of solicitor and client and the influence of the solicitor over his former client have come to an end. *Holman* v. *Loyns* (4) and *Wright* v. *Carter* (5).

1. 3 H L C 607.
2. 3 A C 254.
3. L R 5 P C 516 at 540.
4. 4 D M & G 270 at 283.
5. (1903) 1 Ch 27.

INDIA GENERAL NAVIGATION AND RAILWAY COMPANY, LTD. *v.* DEKHARI TEA COMPANY, LTD., I. L. R. 51 Cal. 304 (P.C).

There being no trace in the evidence in the case as to any special flats or ships having been set apart by the appellant who was otherwise a common carrier for the exclusive service of the Railway Company, there can be no doubt that the Steam Navigation Company, the appellant in the case, acted only as a common carrier in carrying the goods supplied by the Railway Company. That a common carrier can enter into a special contract with a particular customer and depart from his usual business and engage in a different type of business from that of a common carrier is stated in so many terms by their Lordships in this case itself. If so, it would be of interest to see whether it would make any difference if such a special contract reserving some flats for the exclusive use of the Railway Company and to carry the goods supplied by it, which would be left vacant if there were not sufficient goods of the Railway Company though there were other customers with goods which can go into the flats, had been proved in the case. We doubt, whether even then such carriage under these conditions, apart from anything else, would change the Navigation Company from the character of a common carrier in respect of the goods so carried. Although their Lordships have emphasised the necessity of not diverting our attention to the English cases on questions on which Indian law has made special provision, in the absence of any specific direction, it is still possible to refer to English cases for guidance. Indeed, in the leading case on the subject of liability of common carriers in India, not merely the Indian Carriers Act but the common law of England, in so far as it has not been affected by the Act, is said to be the law governing us in this country. [See *The Irrawaddy Flotilla Company* v. *Bugwandas* (1)]. If, therefore, reference to English cases is not entirely out of place, on matters on which the Legislature is silent, the decision in *Liver Alkali Company* v. *Johnson* (2) would seem to lay down that where a barge owner who lets barges for hire lets a barge to only one person exclusively for a voyage, he still continues as a common carrier in so letting it. [*Cf.* how-

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1. (1891) I L R 18 C 620 (P C). 2. L R 7 Ex 267.

ever *Nugent* v. *Smith* (3)]. As to the liability of the various carriers in cases of continuous carriage of goods, where goods are carried with the aid of different transporting agencies, reference may be made to the effect of the English decisions summarised in *Mylappa Chettiar* v. *The British India Steam Navigation Company, Limited* (4).

THEETHUMALAI GOUNDER *v.* KING-EMPEROR, I. L. R. 47 Mad. 746 (F. B.)

The main argument on which this case proceeds, namely, that S. 149, Indian Penal Code, does not create an offence, but like S. 34 is merely declaratory of a principle of common law is opposed to the observation of Lord Sumner in *Barendra Kumar Ghosh* v. *King-Emperor* (1). His Lordship says and that definitely " S. 149, however, is certainly not otiose for in any case, it creates a specific offence and deals with the punishment of that offence alone. It postulates an assembly of five or more persons having a common object, *viz.*, one of those named in S. 141 and then the doing of acts by members of it in prosecution of that object. There is a difference between object and intention for though their object is common, the intentions of the several members may differ and indeed may be similar only in respect that they are all unlawful, while the element of participation in action which is the leading feature of S. 34 is replaced in S. 149 by membership of the assembly at the time of the committing of the offence. " Their Lordships distinguish S. 114 from S. 149 and say that that section is evidentiary and not punitory. The presumption *juris de jure* raised by S. 114 brings the case within the ambit of S. 34. These observations knock the bottom out of the Full Bench decision which would thus require reconsideration.

DORAIVELU MUDALIAR *v.* NATESA GRAMANI, I. L. R. 47 Mad. 761 (F. B.).

This overrules the decision of Spencer and Venkatasubba Rao, JJ., in *Parthasarathy Aiyangar* v. *Doraisami Naicker* (2) where it was held that the provisions as to compulsory sale in the Madras City Tenants' Protection Act did not apply to religious institutions where it is breach of trust on the part of the

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3. 1 C P D 423.
4. (1917) 34 M L J 553 at 557.
1. (1924) 29 C W N 181.
2. (1922) I L R 46 M 823.

trustee to convey. Their Lordships in the previous case were impressed by the absence of provisions like those in the Land Acquisition Act for permanent investment of funds so realised and the general extra commercium nature of properties endowed. Some of the considerations apply equally to minor's estates. As pointed out by the Chief Justice, such a construction would have taken the bulk of the land out of the Act, which could scarcely have been intended. The absence of provision for securing trust funds only illustrates the general carelessness and want of technical skill in drafting exhibited by the local legislature.

SRIRAMULU *v.* LAKSHMINARAYANA, I. L. R. 47 M. 783 (F. B.).

If the end of procedure is to bring among other things litigation to a speedy termination, insistence upon express consent on the part of the guardian would be of considerable assistance in securing that end but those that are accustomed to the devious ways of litigants in this country and the obstacles placed in the way of honest litigation by scheming opponents might be disposed to view with apprehension the consequences of any such general rule. It might necessitate the appointment of a Court guardian in more cases than one could contemplate with equanimity though it may be true that after a time, the utter folly of their conduct might persuade unreasoning guardians to take the more sensible course of signifying their consent. Most clients and unfortunately a large proportion of legal practitioners would prefer not to consent to a course however reasonable and however economical for the parties it might be in the long run from the sheer love of obstruction coupled with a vague belief that something might turn up in the end by the process of obstruction to their advantage. This is to be regretted but must be borne in mind before any general rule theoretically perfect is laid down for the guidance of Courts. There is danger of minor's interests suffering by laxity as to consent when the minor is the sole defendant but the rule generally laid down would equally apply to cases where the minor is only one of the parties equally affected by the suit and all technical difficulties as to guardianship are only loopholes for escape from adverse conclusion of the suit.

Mitra Sen Singh *v.* Janaki Kunwar, (1924) I. L. R. 46 All. 728 : 47 M. L. J. 591 (P. C.).

The main question that arose in this case was one of estoppel. Under a compromise a lady was entitled to remain in possession as an under-proprietor for life. On her death, another lady obtained mutation of names in assertion of an under-proprietary right under the same compromise and continued in possession for eight years paying 15 per cent. collections as rent. She must have been aware of the facts but not the Court of Wards who were in possession on behalf of the proprietor. They brought a suit for the recovery of possession on discovering the mistake.The question was whether the proprietor was estopped. Their Lordships hold, not. On the finding that the lady was aware of the true state of facts, no question of estoppel could arise. Their Lordships seem to put it on the further ground that the Court of Wards was labouring under a mistake and so there was no question of intentionally causing the lady to believe, etc. At first sight this might appear to be opposed to the ruling in *Sarat Chander Dey* v. *Gopal Chunder Saha*(1) where their Lordships make it clear that neither the English Law nor the Indian Law as enacted in S. 115,Evidence Act, lends countenance to the doctrine that " in order to create an estoppel the person whose acts and declarations induced another to act in a particular way must have been under no mistake himself." Their Lordships refer to acts and declarations and not to omissions. This is significant. An omission cannot in most cases be held to " intentionally cause another to believe " where the person omitting had not the knowledge which could impel him to do any act. That mistake may have an important bearing on the question whether a representation can be said to have been made appears from *Goura Chandra Gajapathi Narayana Deo* v. *Secretary of State for India in Council*(2) where "the Court of Wards were in possession of certain forests on behalf of the Zamindar of Parlakimedi under the mistaken idea that they belonged to the Zamindar and the Government Officials under the same mistake acquiesced in that possession and while that state of things continued, encouraged such an expenditure of Zamindari funds as seemed

1. (1892) I L R 20 C 296 (P C).
2. (1905) I L R 28 M 130 (P C).

good in the public interest" their Lordships held that in this there was no such representation as could give rise to the estoppel contended for. This is the rule applied to cases of acquiescence in English Law where a legal right is sought to be defeated. See *Willmott* v. *Barber* (1). The Judicial Commissioner regarded the case as one in which the Court of Wards had practically waived the right to the reversion. Their Lordships hold that estoppel could not be used for such a purpose. The receipt of rent, their Lordships held, estopped the Court of Wards, from claiming mesne profits but it could have no further effect. "It can never be reared up," their Lordships say, "into the creation of a *pukhtdari* right of a proprietary heritable and transferable character nor can it ever create a right of possession of the property for life under the same terms as some other person had previously possessed it upon. Such foundations of title are unknown and they can never be created in such manner."

There is also an approving reference to the observation of Lord Selborne in *Magdalena Hospital* v. *Knotts* that in the case of a void lease by a charity corporation "if any rent had been reserved however small, the legal relation of tenancy from year to year would have been created and the Statute of Limitations could not have run." This goes against the rulings of the Courts in India as to adverse possession of leasehold interest.

HUSAIN BHAI *v.* BETTIA SHAH, I L R 46 All. 733.

The question in this case was as to whether an appeal lies from an order staying execution. This is a question on which there exists a remarkable difference of opinion. An attempt is made in this case to discuss the question on principle. Not all orders in execution are necessarily appealable orders. Some orders have been excluded on the ground that they are mere administrative orders such as orders relating to settlement of proclamation or refusing leave to bid *Ko The Hnyin* v. *Ma Hnin I* (2). Their Lordships of the Privy Council call the latter "a matter of administration." Another ground on which orders have been excluded is that

1. 15 Ch D 105.

2. (1911) I L R 38 C 717 (P C).

are interlocutory, for instance, the decision on an issue imitation or on a point of evidence or procedure is regard- as not coming within the section. *Ramji Ram* v. *Salig-* (1). It must be a final decision. The question is whe- stay of execution is such an order. One of the Judges took part in the decision seem to exclude it on the ground it is a matter of discretion. This, we think, is a wholly nable ground. That objection cannot go to the com- cy of the appeal but is material only when the Court has e up its mind whether it shoud interfere or not. The udge puts it on the ground that it is not a final decision ing the rights of parties. The rights of parties in are not the same as the rights of parties in a suit. of the test suggested in one of the cases, *viz.*, that must be such as could be litigated in suits has out by Mr. Justice Mukerjee in *Ramji Ram* v. . You cannot bring a suit to attach a property man. Those are matters for the execution ely. In the sense that you can bring a suit for t the arrest was wrongful or attachment il- uld be nothing in principle against bringing a suit on that the Court's order staying execution was ng execution might in certain circumstances be al to the interests of the party than refusing difficult to see why an unauthorised postpone- on is not as much a denial of the right of the al of arrest. The omission of the words " or tion " in S. 47 is not of much consequence as e not in the Civil Procedure Code of 1882 but that stay of execution came within the section. nullify the effect of a solitary decision in the n Calcutta that those words were added. As tion is generally only by the Appellate Court to would not apply, it is but rarely that appeals are rom such orders. The circumstances in which the g Court is authorised to stay execution of the decree the rules are very few. It is only if the inherent power ay is conceded that the necessity for appeal becomes ent.

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1. (1911) 14 C L J 189.

DURGA PRASAD SAHU *v.* TAMESHAR PRASAD, I. L 46 All. 754.

It is not every inclusion of a bit of land to give juri tion to a Sub-Registrar not otherwise having jurisdiction is struck at but only fraudulent inclusion. There is not to prevent a person from adding a bit of land of his t Zemindari which he intends to sell in order to jurisdiction to a particular Sub-Registrar. Fraud co in where the inclusion is a make-believe, where the property is non-existent or the party has no and could not have intended to pass title by the ment. Where the party believes he has title, how founded that belief may be, and proposes to con motive for conveying is quite immaterial and the no question of any fraud on the Registration La he did not believe he had a title, if he was in there are other circumstances clearly indicatin conveyance is intended, it is difficult to see ho said that any fraud on Registration Law is in petrated. It is not fraud that the rulings stri on Registration Law.

KALI CHARAN *v.* PIARI, I. L. R. 46 All. 7

The question in this case is governed by the Privy Council in *Sham Koer* v. and *Satgur Prasad* v. *Raj Kishore La* widow of an undivided member held posses nary property and their Lordships held session of the widow must be taken to the other co-parceners and that barred after twelve years. Their Lordships from the fact that the widow in a previous s the *karar* set up by the other side purporti a life estate also set up an alternative claim the *karar* she was entitled to a life-estate, that sh for a life-estate. In *Lachhan Kunwar* v. *Manora* their Lordships while doubting if prescribing for estate was possible—the doubt has since been dis 5 Lah. 192—say " that it should be clearly shown tha the widow took possession, she professed to do it as cl only the limited estate of the widow. "

1. (1902) I L R 29 C 664 (P C). 2. (1919) I L R 42 A 152 (P
3. (1894) I L R 22 C 445 (P C).

MEGHJI VALLABHDAS *v.* DAYALJI AND CO., (1924) I L R 48 Bom. 341.

In this case, the learned Judge has held, following *Vadapalli Narasimham* v. *Dronamraju Seetharamamurthi* (1), in the case of a lease governed by the provisions of the Transfer of Property Act, that where a tenant continues in possession of the demised premises after the term of his tenancy and the landlord assents to his being in possession on some terms to which the tenant does not agree, he still holds under an implied yearly or monthly tenancy as the case may be under S. 116 of the Transfer of Property Act. In such cases, in England the tenancy that is created when a tenant holds over and pays rent, is said to be by way of implied demise, as distinguished from cases where a tenancy is created by a lease or by entering under an agreement to lease. *See* Foa on *Landlord and Tenant*, p. 445 (6th Edition). Although the provisions of S. 116 are not identical with the English Law on the question, the tenancy that arises in this country under that section would also be one which is implied by law as distinguished from the express tenancies dealt with the previous sections of the Act.

As there are some classes of leases to which the provisions of the Transfer of Property Act do not apply, *cf.* S. 117 of the Transfer of Property Act, it is not easy to see what the result would be if in the case of such a lease, the tenant were to continue in possession after the expiry of the term and the landlord assents to the continuance and no terms are agreed to by both parties. In such a case under the English Common Law an implied tenancy at will is created at the first instance which would be converted into a tenancy from year to year on the receipt of rent by the landlord. See *Per Atkins, L. J.*, in *Cole* v. *Kelly* (2). In this connection we may say that a tenancy at will is not unknown in this country. See *Manicka* v. *Chinnappa* (3). Thus it may be open to argument whether even in this country an agricultural tenant holding over after the expiry of his term with the consent of the landlord does not become a tenant at will at the first instance. It is possible that seeing the precarious nature of a tenancy at will, the learned Judges in *Vadapalli Narasimham* v. *Dronamraju Seetharamamurthi* (1) held that even to such a case the principle of S. 116 of the Transfer of Property Act applies.

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1. (1907) I L R 31 M 163 : 18 M L J 26.

2. (1920) 2 K B 106 at 132. 3. (1912) I L R 36 M. 557.

There is a further point in *Vadapalli Narasimham v. Dronamraju Seetharamamurthi* (1) which may be noticed here. There the learned Judges seem to hold that for the consent of the landlord to operate to convert a person holding over into a yearly tenant, he should be the original tenant himself, and not his successor or legal representative. It must be said that there is some warrant for this view in the language of S. 116 of the Transfer of Property Act. The reasoning of the learned Judges is that only a tenancy at suffrance can be converted into a tenancy in the real sense of the term by the consent of the landlord, and because a tenant at suffrance can only be the person who originally entered rightfully and continues by wrong and a tenant at suffrance cannot transfer his rights to another, his heirs could not be converted into yearly tenants by the mere consent of the landlord to their remaining in possession. Although it is clear that a tenant at suffrance cannot let another on the property, it does not seem to be settled whether on the death of a tenant at suffrance his legal representatives do not stand in the same position as himself. *See* 18 Halsbury, p. 438. Cf. *Doe d Burrell* v. *Perkins* (4). If the legal representative entering on the death of the original tenant at suffrance also becomes a tenant at suffrance, the consent of the landlord would convert him into a yearly tenant. Although this question arose in *Ram Chandra Singh* v. *Bhikhambar Singh* (5) it does not seem to have been noticed or considered in that case.

We would here point out that even the idea of the introduction of the conception of a tenancy at suffrance into this country has been doubted in *Subravetti Ramiah* v. *Gundala Ramanna* (6) and *Madar v. Kader Moideen* (7) on the ground that the Transfer of Property Act has made specific provision for the termination of a tenancy in the contingencies mentioned in S. 111. But we are not sure whether the observations can be given their full effect in all cases, as there are still a large class of tenancies not falling within the Transfer of Property Act to which the provisions of S. 111 of the Act cannot therefore apply. *Cf.* S. 117 of the Transfer of Property Act.

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1. (1907) I L R 31 M 163 : 18 M L J 26.
4. 3 M and S. 271. 5. (1910) I L R 37 C 674.
6. (1910) M W N 145. 7. (1914) I L R 39 M 54.

RUSTOMJEE HEERJEEBHOY *v.* COWASJEE DADHABHOY, (1924) I. L. R. 48 Bom. 348.

Notwithstanding the generality of the language of S. 35 of the Civil Procedure Code vesting the discretion for awarding costs in the Court hearing the matter, the Courts have exercised the discretion according to well-settled principles with the object of rendering compensation to the successful party without inflicting unnecessary hardship on the defeated client. The result has been that when there are more defendants or respondents than one succeeding in a suit or appeal, appearing by separate pleaders, the Courts award separate sets of costs when their cases are distinct. Where, however, the cases are not distinct, the question whether they are entitled to separate sets of costs when appearing by different pleaders depends upon whether there was a justification in the circumstances of the case for their separating in the defence as they did. If there is no justification for their severing the defence, only one set of costs will be allowed which will be divided among the successful defendants or respondents. This principle was clearly laid down under the Civil Procedure Code as early as 1878 in *Ram Chunder Sen* v. *Koomar Doorga Nath Roy* (1). In so far as the mofussil Courts in Madras are concerned, the matter whether only one pleader's fee is to be allowed or more than one, is governed by Rr. 283 and 284 of the Madras Civil Rules of Practice. The case is, however, *a fortiori* when co-trustees are made defendants or respondents in a case and they succeed ; in such cases, it is well settled that where several persons who fill a joint fiduciary character are made defendants, they ought to answer and defend together. If they do not and there are no special circumstances, such as for instance, the existence of personal interest in one of the trustees or the fact that one of the several trustees can admit facts which the others do not believe to be true, in which event it would be impossible for them to answer together with prudence, only one set of costs would be allowed. *Gaunt* v. *Taylor* (2). Cf. also *Course* v. *Humphrey* (3), *Prince* v. *Hine* (4) and *Attorney-General* v. *Wywille* (5). In the case under notice, apparently there were no special circumstances and the learned Judges allowed only one set of costs although the several trustees appeared by separate

1. (1878) 2 C L R 152.
2. 2 Beav 346.
3. 26 Beav 402.
4. 27 Beav 345.
5. 28 Beav 464.

solicitors. The rule of practice as to the stage when such separate costs ought to be applied for in the course of a case was also laid down in similar terms in *Ram Chunder Sen* v. *Koomar Doorga Nath Roy* (1).

DHANRAJ GIRJI NARSING GIRJI *v.* TATA SONS, LTD., I. L. R. 49 Bom. 1.

If the subject-matter of the contract to sell in this case had been goods, instead of land, the learned Judges would have assessed the damages for such breach of contract on the ordinary principle that the party injured by the breach should, so far as money can do it, be placed in the same situation with respect to damages as if the contract had been performed; and he would therefore have recovered for his loss of bargain, even though the agreement could not be carried out because there was a defect in the vendor's title to the goods. If this is the result in the case of goods under S. 73 of the Contract Act and the person complaining of a breach can recover the excess of the market price over the contract price on the date of the breach, it is difficult to see any principle on which a different measure of damages can be adopted under the same section to contracts for the sale of immoveable property. The rule restricting the claim under a breach of contract to sell immoveable property which fails owing to defect of title in the vendor, to a return of the deposit and the expenses of the investigation of title, is considered even in English Law as an anomalous one and as being an exception to the common law rule as to damages. This will be evident from the fact that if the contract is not performed for causes other than defect of title, the damages are assessed on the ordinary rule and that if the vendor complains of a breach of contract, and not the purchaser, damages can be recovered for the loss of bargain. Whatever may be the authority of *Bain* v. *Fothergill* (2) so far as England is concerned, as a decision of the House of Lords, there seems to be hardly any answer to the argument on principle of Sir George Jessel in the case and the authority of *Flureau* v. *Thornhill* (3) is rested more on its age and the practice of conveyancers based on it than on any of the grounds on which it was decided; and indeed the learned Lords in the later case disapprove of the grounds of the earlier

1. (1878) 2 C L R 152. 2. L R 7 H L 158. 3. 2 W Bl 1078.

decision. We venture to think, with great respect, that when the learned Judges rely for their guidance on the decision in *Bain* v. *Fothergill* (1) though they are not prepared to rely on it wholly, it is introducing an element of confusion and uncertainty on the subject which has been avoided by the other High Courts and even by the Bombay High Court in many of its earlier pronouncements. The learned Judges have not expressed themselves as to the extent to which the English rule can be adopted consistently with S. 73 of the Contract Act; and to this extent, we cannot regard the law on the subject to be settled by this decision beyond doubt. For instance, it cannot be said with certainty whether under this decision, where a person contracted to sell land to which he knew he had no title, the other party can only recover in an action for breach of contract the expenses of investigation of title and the return of the deposit, with another action for damages for deceit, as under the strict rule of English Law or whether he can recover the difference between the market price and the contract price in an action for breach of contract and whether the result in the suit will be affected by the knowledge of the party complaining of the breach that his vendor had no title to the property. In this connection, it is useful to observe that Mr. Justice Fawcett in the case under notice rests his decision to some extent on the circumstance that the case arose in Bombay where conveyancing work is done on lines similar to those in England. It is therefore possible in the view of that learned Judge that cases from the mofussil may be decided on different principles.

KESHO PRASAD SINGH *v.* SHEO PRAGASH OJHA, I L R 46 All. 831 (P. C.).

In a suit by the then presumptive reversioner it was found against the mortgagee from the widow who had obtained a decree upon it that the decree did not bind the reversioner and the present suit was on the death of the widow by the actual reversioner for possession of the property and the question was whether the decision in the previous suit bound the purchaser from the mortgagee purchaser. Their Lordships hold that he was bound and that this conclusion flowed from the judgment of their Lordships in *Venkatanarayana Pillai* v. *Subbammal* (2) and *Janaki Ammal* v.

1. L R 7 H L 158.
2. (1915) I L R 38 M 406 : 28 M L J 535 (P C).

Narayanaswami (1). A further statement occurs in the judgment which the reporter has thought justifies the headnote ".further and different considerations would have applied if the previous suit had failed." The statement of the Privy Council is :—" Their Lordships of course recognise that the principle is less obviously just where it operates to bind the ultimate reversioners by the result of a suit in which the plaintiff had failed whose interest, then merely presumptive, never ultimately matured. The danger of a feigned issue in such a suit is not to be overlooked. But this danger is mainly serious where the failure of the first suit has been brought about by fraud or collusion, where, of course, further and different considerations would arise. " On this statement, there does not seem to be any doubt as to the application of the principle to such a case but their Lordships think that caution is necessary in applying it so as to exclude suspicion of fraud and collusion.

KUNTI *v.* GAJRAJ TEWARY, I. L. R. 46 All. 847.

The decision in this case proceeds upon the doctrine of part-performance which has become a vexed question in recent years. The case was one of compromise between rival claimants to an estate and they agreed by way of compromise to divide the estate and each went into possession of his share. Their Lordships assume that a registered transfer deed was necessary to pass title in the case and hold that the facts brought the case within *Mahomed Musa* v. *Aghore Kumar Ganguli* (2). We do not see any justification for the assumption that a compromise requires a registered deed to give effect to it (13 M. L. J. 500) though it is true that if there is a writing embodying the terms of the compromise, the writing may require registration under the Registration Act. Possibly in this case, there was a writing and it may well be to this aspect of the case that the Judges refer when tehy say, " indeed having regard to some of the *dicta* in the Full Bench case in I. L. R. 38 All. it would appear that the less documents there are to support a claim of this kind, the less difficulty the litigant is likely to experience in the lower Court. " No doubt it is an anomaly but there it is.

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1. (1916) I L R 39 M 634 : 31 M L J 225 (P C).
2. (1914) I L R 42 C 801.

DARBARI LAL *v.* GOBINDA SARAN, I L R 46 All. 822.

Whatever difference of opinion there might be as to whether a plaintiff claiming under different sale deeds for instance is bound to sue in respect of all of them against the same defendant, there is no doubt that the plaintiff suing under a single title is bound to sue the defendant at the same time though his defences in respect of different lands might be different. The reversioner who sues on his title as heir ignoring the alienations by the widow is bound to sue the defendant for the entire property in his possession though the defendant's claim is under different alienations. It does not quite matter whether it is by reason of O. 2, R. 2, or by reason of S. 11 Ex. IV that this conclusion is reached. The decision under review puts it under O. 2, R. 2, perhaps rightly. The ground of title of the plaintiff is his heirship to the last owner and his right arises on the death of the widow apart from any question as to how she dealt with it. Her dealing with it is a wholly irrelevant circumstance. If the claim of the plaintiff proceeds upon the affirmation of the disposition of the widow, the disposition becomes material and the cause of action would be different. For instance, take the suit against defendant in respect of A property on the footing of an invalid sale by the widow, in respect of B property on the footing of a lease for a year granted in the course of management, in respect of property C on the footing of a usufructuary mortgage improperly granted but affirmed by the reversioner. The cause of action in respect of them would be different and he would not be bound to combine in respect of all of them. The limitation in each case would be different, the defences would be different and the reliefs also different. This view does not conflict with the view put forward in *Dampanaboyina Gangi* v. *Addala Ramaswami* (1) which lays down that where defendants and the lands sued for are different, the causes of action are different. The cause of action has necessarily reference to the person of the defendant and where the persons sued are different, the causes of action are necessarily different though in certain cases having regard to the nature of the claim the difficulty of joining one of the persons who is a necessary party who has been previously sued may lead to the failure of the action.

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1. (1902) I L R 25 M 736 : 12 M L J 103.

SRI GANESHJI *v.* LALTA PRASAD, I. L. R. 46 All. 842.

When a decree is passed for mesne profits against the properties of an idol, the Court may execute the decree against the properties of the idol but we do not see why it should not in the first instance direct the party to proceed against the income as their Lordships indicate in *Thakur Prosunno Kumari Debya* v. *Golab Chand Baboo* (1) as the proper course. Their Lordships say there :—" It is to be observed that the execution of the judgments sought to be set aside is decreed and in their Lordships' view rightly against the rents and profits of the Debutter property." The previous suit was on mortgage bond for necessity and yet their Lordships hold that the decree was rightly confined to rents and profits. It is quite another question if the rents and profits are not sufficient to pay the decree amount. The decision in *Pramada Nath Ray* v. *Poorna Chandra Ray* (2) is full of dangerous possibilities and normally, trespassing is not part of the duties of a shebait and it is only in exceptional cases that the Debutter estate should be made liable for it.

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1. (1875) L R 2 I A 145. 2. (1908) I L R 35 C 691.

SITA RAM SINGH *v.* CHEDDI SINGH, I. L. R. 46 All. 882. Under the Mitakshara Law as administered in the United Provinces, an alienation of the joint family property in the absence of justifying necessity and without the consent of the other members of the family is totally bad and though it may be affirmed by the other members if any further member is born into the family before such affirmance, his consent also would be necessary to validate the sale. The same is true of Madras also except to this extent, viz., that the alienation will stand to the extent of the alienor's share at the date of the alienation and the share very probably of every member affirming the transaction as it stands at the date of the affirmance. Limitation presents no difficulty when the article applicable is Art. 126, where the starting point of limitation is the date of possession by the alienee. In such a case their Lordships of the Privy Council have recently decided that Ss. 6, 7 and 8 of the Limitation Act do not extend the period of limitation by the term of the minority of the subsequently born sons. Those sections have, in their Lordships' opinion, reference only to the minority of the members *in esse* at the date of the accrual of the cause of action. But would that reasoning apply to a case where the article of limitation applicable is Art. 144, the starting point under that article being the time when possession became adverse to the plaintiff? How can you have adverse possession against a person who is not in existence? It has been held in several cases both here and in England that possession will not be adverse so long as there is no person entitled to sue (*See* 18 I. C. 373 : 34 I. C. 945.) But that principle is not, we think, applicable to the case of a Hindu joint family. It is not a case where there is nobody that has the right to sue. The property completely vests in the members *in esse* with powers of disposition and affirmation so as to totally exclude the subsequently born member so long as he is not born. Whether it is open to the member who has alienated to bring a suit to recover possession of the property or not, the other members can sue on behalf of the family so as to bind the subsequently born member by the conclusion in such a suit. Under those circumstances the members *in esse* must be regarded "as persons from or through whom" the subsequently born members "derive their right to sue." There is no reason why the same argument should not apply to Madras as well for though an equity in favour of

the alienee is recognised in Madras, it is equally recognised that the status of the family is not affected by such alienation either quoad that property or other properties of the family.

BOHRA AKHEY RAM *v.* BASANT LAL, I. L. R. 46 All 894.

This case raises the same point as was settled recently so far as the Madras High Court is concerned by a Full Bench of that Court in *Meyyappa Chettiar* v. *Chidambaram Chettiar* (1) after a large amount of conflict. The Full Bench itself is divided in opinion, the majority being in favour of the view that once an execution petition is put in, the attachment before judgment becomes an attachment in execution with precisely similar privileges and disabilities, among others—the liability to be raised if the application for execution is dismissed for default. It will be seen that one of the cases relied upon for this conclusion by Mr. Justice Ramesam is a North West Provinces High Court Reports Case (2). A Bench of the Allahabad High Court decide the case in quite the contrary sense.

LAL UMRAO SINGH *v.* LAL SINGH, I. L. R. 46 All. 917.

Though part of the reasoning in this case is vicious, the conclusion would seem to follow from the course of decisions which have laid down that a mortgage debt can be attached and sold as a debt, and the security will follow without being expressly sold. The result is anomalous—the anomaly specially appears when a usufructuary mortgage is in question. The Bombay High Court would seem to exclude usufructuary mortgages from the rule. *Manilal Ranchod* v. *Motibhai Hemabhai* (3). *Ramasami Moopan* v. *Srinivasa Aiyangar* (4) would make a somewhat unintelligible distinction between cases of mortgages where a debt is payable and those where a debt is not payable without reference to the fact whether the mortgage is usufructuary or otherwise Having regard to the very definition of mortgage, even a usufructuary mortgage is a security for a *debt* and therefore would be attachable as a mere debt. It is well if the Legislature or the Rules Committee removes the anomaly.

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1. (1923) I L R 47 M 483 : 46 M L J 415. 2. 1 N W P (H C) 96.
3. (1911) I L R 35 Bom. 288. 4. (1915) 28 M L J 338.

WAMAN MARTAND *v.* THE COMMISSIONER, C. D., I. L. R. 49 Bom. 73.

The question that arose for decision in this case is one of some nicety under the Stamp Law which has not been the subject of judicial consideration in this country or in England. Several properties were subject to a mortgage. One of the properties was sold for its full market value, the vendor undertaking with the buyer to bear the full amount of the mortgage charge himself ; and a reference was made under the Stamp Act whether, under S. 24, the sale deed was chargeable with the duty on the amount of price alone or on the full amount of the charge on the property which was in excess of its value. Although when a property which is subject to a mortgage is sold, all that passes to the purchaser is only the equity of redemption, except when the mortgagor and the mortgagee join in conveying the property to the buyer, for the purpose of revenue the stamp duty payable on the sales of equity of redemption is calculated not merely on the value of the equity of redemption but on the balance of mortgage amount as well. Otherwise, the State would stand to lose the amount of revenue, as the stamp duty on a sale for the full value of the property may exceed the aggregate of duty payable on the mortgage and on the sale of the equity of redemption valued merely as such. What Baron Martin said in *Mortimore* v. *The Commissioners of Inland Revenue* (1) as being the scope and object of the Stamp Law in England may well be accepted as laying down the intention of the Legislature in enacting S. 24 of the Indian Stamp Act of 1899. The learned Baron observed : "The scope and object of the enactment is clear, *viz.*, that upon every purchase *ad valorem* duty shall be paid on the entire consideration which either directly or indirectly represents the value of the free and unencumbered corpus of the subject-matter of the sale." The stamp duty on the sale deed was paid on the market value of the property in the case under notice ; and the learned Judges held that it was correct. As their Lordships have pointed out, the language of the explanation to S. 24 is somewhat unhappy as it has not taken into account all the possible classes of cases, such, for instance, as the one that arose in this case. It is therefore unduly wide and it has therefore been restricted in its operation to cases where the purchaser has rendered him-

1. 2 H & C 838 at 853.

self liable to pay the incumbrances. Even if it is to be so understood, there would still remain some anomaly, as for instance, where a number of properties are subject to a mortgage for a certain amount and each one of the properties is sold separately to different persons without the vendor undertaking to pay the incumbrances. We presume in such a case *ad valorem* duty on the full value of the incumbrance will have to be paid on each one of the sale deeds. Again, it is not clear what would be the stamp duty on a document by which the mortgagor relinquishes the equity of redemption to the mortgagee and the amount of the mortgage debt exceeds the value of the property. It has been said that in such a case in England *ad valorem* duty has to be paid only on the value of the property.

MANICKAM PILLAI *v.* MAHUDAM BATHUMAL, I. L. R. 47 Mad. 819 : 47 M L J 398 (F. B.)

The question whether a person has appeared and the question whether his non-appearance is wrongful or unauthorised are two quite different questions. Appearance or no appearance is a question of fact uncomplicated by questions of law. The party may have authorised a vakil to appear. If the vakil does not come to Court at all, there could be no question, he does not appear though he was authorised to appear and may be, and ought to have appeared. It cannot make any difference if he says he does not appear in the case though he ought to. His not appearing may be wrongful but the party cannot be said to have appeared. Nor again, can a person situated like a vakil, be said to appear when he has no instructions enabling him to appear. If a party appearing by vakil cannot be said to appear by the fact of his mere physical presence [see *Gopala Row* v. *Maria Susaya Pillai* (1)] *a fortiori* when the vakil who appears for him has no instructions and says he cannot appear.

KRISHNAMACHARIAR *v.* SRIRANGAMMAL, I. L. R. 47 M. 824 : 47 M. L. J. 409 (F. B.).

The question in this case was as to whether the rule added on by the High Court to O. 9, R. 13, making S. 5 of the

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1. (1906) I L R 30 M 274: 17 M L J 225.

Limitation Act applicable to applications coming under that rule was *intra vires*. The whole difficulty arises out of the clumsy ways of the Legislature. It might have directly provided in S. 122 power to make S. 5 applicable to such applications as it shall deem fit just as it has given power to the High Court to amend, add to or alter the rules in the schedule to the Civil Procedure Code. But as it is, the question was—is the rule *intra vires*? The argument of the Full Bench in this case is so far as one gathers is that limitation is procedure. Under S. 122 the High Court is given power to regulate procedure and the rule in question does not alter or amend the Limitation Act as S. 5 of the Limitation Act contemplates the application of S. 5 to applications by *rule*. It cannot be denied that limitation is procedure [*Reg* v. *Dorabji Balabhai* (1) and *Munjhoori Bibi* v. *Akel Mahmud* (2)] and it would be perfectly competent to the High Court to frame rules specifying a time, for instance within which a written statement should be put in and so forth but it is not competent to it to alter the rules laid down by the Limitation Act. As the rule in question has not the effect of altering the Limitation Act, the rule is *intra vires*. Although the reasoning is not altogether satisfactory, it has the merit of giving effect to the obvious intention of the Legislature. If the rule is once in the Civil Procedure validly, the subsequent taking away of the power of the High Court cannot affect the validity of the provision so introduced. But their Lordships are probably right in holding that the alteration of language does not affect the power of the High Court. The word "enactment" would certainly include the Civil Procedure Code—both sections and schedules. Any alteration made in the Civil Procedure by the application of the machinery provided by the Act would equally be an enactment.

AMMAKANNU AYI *v.* MURUGAYYA ODAYAR, I. L. R. 47 M. 850 : 47 M. L. J. 85.

Suit against a wrong person on a right cause of action cannot bar a fresh suit against the right person. Suit and decree against one of the right persons might bar a suit against the other so far as Indian Law is concerned, (*i*) if

1. (1874) 11 Bom H C R 117.

2. (1913) 17 C L J 316.

you cannot sue the other person alone, (*ii*) if the remedy was alternative and the suit amounted to an election. An instance of the former is an action for winding up a partnership; of the latter, possibly, the case of principal and agent. Manager's and guardian's cases will not come under either of these because, (*i*) in neither of the cases is personal liability necessarily excluded, and (*ii*) there is no rule of procedure that requires a joinder of both in an action. On the question whether a document executed by a person who is a guardian or manager in his own name should be held to bind his ward, there is a lot of literature. In the case of the managing member of a Hindu family who set up his exclusive title to the property, the Privy Council held in *Balwant Singh* v. *R. Clancy* (1) that the alienation would not bind the brother. There it was clear that the brother denied the title of the younger brother. Where the question is doubtful, and the purpose is a binding purpose, the tendency is to support the alienation on the footing of all the powers vested in the alienor. In the case of a father, it was held in *Adimula* v. *Alamelu* (2) that the description of the property as self-acquisition by the father was not sufficient to exclude the alienee from the benefit of the rule. The way in which *Balwant Singh's* (1) case has been explained in that case is not satisfactory but the judgment may be supported on the ground that such a description did not necessarily denote that the father was setting up an adverse title. It will be found that in the well-known case of Hanuman Pershad Pandey, the mother who was not the *de jure* guardian (the Court of Wards being the guardian) had purported to pledge the minor's property describing herself as proprietor and yet their Lordships upheld the pledge on the ground that there was no intention to act adversely to the minor. In this case, having regard to all the circumstances, the Lower Court had held that the guardian purported to act only in her individual capacity and in denial of the rights of the adopted son. In that view, there was no power to proceed against the ward.

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1. (1912) I L R 34 A 296 : 23 M L J 18 (P C). 2. 4 L W 126.

SOBHA RAM *v.* TURSI RAM, I. L. R. 46 All. 693 (F. B.).

O. 21, R. 103 is a stringent rule and before a man's right of suit is taken away, the case must clearly come within the scope of that rule. In this case an application was made in advance under O. 21 R. 95 by the decree-holder to remove the sons on the ground that they were holding on account of the judgment-debtors their fathers. The Court heard them and dismissed the application, holding that they were in possession on their own account. The question was whether this order barred a suit by the decree-holder more than a year after. The majority held, not, Mr. Justice Mukherjea dissenting. We think the majority are right. We think R. 97 contemplates steps taken to obtain possession through Court and actual obstruction or resistance and not mere possibility and apprehension of obstruction or resistance before any attempt is made to take possession. It has been held that each obstruction or resistance gives the decree-holder a fresh cause of action under Art. 167.

ABDUL HAKIM KHAN CHOWDHURY *v.* ELAHI BAKSHA SHA, I. L. R. 52 Cal. 43.

In this case, Mr. Justice Chakravarti has attempted to classify the cases in which from the circumstances appearing in cases of tenancies, not being agricultural tenancies or arising after the Transfer of Property Act, Courts have inferred a permanent tenancy. The real difficulty in evolving a rule of law from out of these decisions seems really to be that the inference of permanent tenancy seems to be one largely of fact arising from the circumstances of each case. On analysis, the learned Judge finds the cases falling under two distinct heads, the first in which an inference of permanent tenancy has been raised from the circumstances on the presumption of a lost grant and the second on the rule of equitable estoppel. The case under notice was not rested in the second head, and the learned Judge went into a somewhat full examination of the cases falling under the first head.

It has to be observed that from the history of the doctrine of lost grant which was evolved about the 18th century in England, it arose out of the difficulty of proving the acquisition of an easement by prescription at common law from the time of King Richard I and the juries were consequently sometimes directed to find a lost modern grant from an uninterrupt-

ed user without objection and as of right even for twenty years. The acquisition of a right by a presumption of lost grant has therefore been applied to cases of incorporeal hereditaments which lie in grant; and the doctrine has therefore been availed of in the cases of easements, profits *a prendre* and rights of common. We are not therefore clear whether the presumption of lost grant has ordinarily been invoked in the cases of leaseholds. It must however be stated here, that there are some observations in *Naina Pillai Maracayar* v. *Ramanathan Chettiar* (1) suggesting the applicability of the fiction of a lost grant to cases of permanent tenancy. If the doctrine of the lost grant is thus available to cases of leaseholds, we are not sure that the fact that the user commenced only forty or forty-five years prior to suit would in law be sufficient to negative the presumption as there is no fixed period which will give rise to the presumption of a modern lost grant. In some of the older cases, even twenty years user has been held sufficient. See the cases referred to in *Angus* v. *Dalton* (2). In more recent years a lost grant has been presumed from user for 50 years and less. *Attorney-General of Southern Nigeria* v. *John Holt and Company* (3). Cf. *Cowlam* v. *Slack* (4). It does not seem to be material for the raising of this presumption whether the commencement of the user was known or unknown. In the case of *Attorney-General of Southern Nigeria* v. *John Holt and Company* (3), the commencement of the user was well known and still their Lordships of the Privy Council inferred a grant of a licence from the Crown. It is significant to notice, in this connection, that the presumption of a lost grant cannot be rebutted by proof that no such grant was made in fact. See *Angus* v. *Dalton* (5).

THE COMMISSIONER OF INCOME-TAX *v.* BINNY AND CO., I. L. R. 47 Mad. 837 : 47 M. L. J. 242.

When instead of the profits being distributed as dividends, they were converted into capital and each shareholder was given so many additional shares, the question was whether this was *income* within the meaning of the Income-tax Act. The subject is one on which opinion is very much divided. On the one side (in support of the opinion of the Bench in this case)

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1. (1923) I L R 47 M 337 : 46 M L J 546 (P C).
2. 3 Q B D 85.
3. (1915) A C 599.
4. 15 East 108.
5. 4 Q B D 162 at 172.

is the opinion of the majority in *Inland Revenue Commissioners v. Blott—Inland Revenue Commissioners* v. *Greenwood* (1) ; against it is the view of Lords Sumner and Dunedin. Three of the learned Judges who took part in *Inland Revenue Commissioners* v. *Blott—Inland Revenue Commissioners* v. *Greenwood* (1) think that the decision in *Bouch* v. *Sproule* (2) which they follow is inconsistent with the judgment of the Judicial Committee in *Swan Brewery Co., Ltd.* v. *Rex* (3). The judgment of the Privy Council is binding on Indian Courts. The judgment of the Privy Council would not bind the House of Lords and it is open to them to point out how the wording of the statute which they had to construe differed and how that circumstance detracts from the value of that judgment as a precedent. But is it open to a subordinate tribunal to whittle away the authority of a higher tribunal by substituting a reason for the judgment valid in its opinion in the place of the reason actually given by that tribunal ? That method of dealing with authorities is vicious and is generally condemned.

VAIDYANATHA AIYAR *v.* SWAMINATHA AIYAR, I L R 47 M. 884 : 47 M. L. J. 361 (P. C.).

In this judgment their Lordships seem to lay down three propositions with reference to S. 92, Civil Procedure Code,

(i) that all public Hindu temples are *prima facie* to be taken as dedicated for the use of all Hindus resorting to them;

(ii) but that the interest contemplated by the section is not the bare possibility, that a Hindu might desire to resort to a particular temple but something more than that—only those that regularly worshipped in a temple would have such interest;

(iii) the descendants though in the female line of the founder had enough interest to maintain such a suit.

Their Lordships would thus seem to adopt the judgment of the majority in *T. R. Ramachandra Aiyar* v. *Parameswaran Unni* (4).

They would seem to be inclined also to support the view of the majority in *Gauranga Sahu* v. *Sudevi Mata* (5) that the heirs of the founder would have the right to nominate a trustee for the charity.

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1. (1921) 2 A C 171.
2. (1887) 12 A C 385.
3. (1914) A C 331.
4. (1919) I L R 42 M 360 : 36 M L J 396.
5. (1917) I L R 40 M 612 : 32 M L J 597 (F B).

In this case however the founder's heir asserted that the property belonged to him and though he provided for the performance of some of the charities, their Lordships hold his appointment being on the footing of his being owner, the appointment was bad. If his intention is to continue the charities as they were intended to be was clear, the words would not have stood in the way of the appointment being considered as an appointment of a trustee to the original trust. The substantial intention of the testator their Lordships thought was to benefit certain illegitimate descendants of his at the expense of charity. Hence the somewhat strict construction.

GOVINDA NAIDU *v.* CHENGALRAYA MUDALI, I. L. R. 47 M. 896 : 47 M. L. J. 415 (F. B.).

There was a lot of conflict as to the proper construction of S. 153 of Estates Land Act (there is no question it is very badly drafted) but judicial opinion has been more or less gravitating towards the conclusion that the grounds mentioned in Section 153 are not exhaustive of the circumstances in which a suit in ejectment would lie but that a suit brought on other available grounds should be brought in a Civil Court. The Full Bench has set its *imprimatur* on this view. Perhaps they are right. But it is difficult to see on principle why the forum should change according to the grounds urged for eviction.

The Bench had another point to decide as to whether a benamidar in the sense of a transferee from a real owner for the benefit of the latter could sue under the authority of the ruling of the Privy Council in *Gur Narayan v. Sheolal Singh* (1) or only transferees for consideration supplied by another. Benami is really resulting trust as pointed out by the Privy Council in that case and in *Bilas Kunwar* v. *Desraj Ranjit Singh* (2). S. 81 of the Trusts Act provides for transfer for no consideration by the real owner, S. 82 of the Trusts Act for benami transfer for consideration supplied by another. There is no distinction between the two cases. It is refinement of a refinement to make a distinction between the two cases or to make a further distinction between a sham and a benami transfer as is sometimes attempted.

1. (1919) I L R 46 C 566 : 36 M L J 68 (P C). 2. (1915) I L R 37 A 557 (P C)

GOBINDA LAL GHOSE *v.* NALINI KANTA GHOSE, I. L. R. 52 Cal. 63.

In this case an adult person obtained a decree and died within three years thereof. His legal representative was a minor at his death and the judgment-debtor got himself appointed as the guardian of the minor and the decree was consequently not executed during his guardianship. After some years he was removed from the guardianship and another guardian was appointed who applied for executing the decree when the judgment-debtor objected that the execution of the decree was barred, as it was more than three years after the decree; but the learned Judges held that the period of the judgment-debtor's guardianship should be deducted in computing the period of limitation for the execution of the decree on the ground that there was fraud on the part of the judgment-debtor in getting himself appointed as guardian without disclosing the existence of the decree. Although this decision is essentially just, the provision of the Limitation Act under which the period was deducted is not given by the learned Judges and it is not easy to find any such provision. After the decision of their Lordships of the Privy Council in *Soni Ram* v. *Kanhaiya Lal* (1), it is no longer open to argument that even a temporary fusion of the interests of the obligor and the obligee in the same person would suspend the operation of the rule of limitation after time has once commenced to run ; and the decision in *Narrondas* v. *Narrondas* (2) was really distinguishable as the hand that had to pay and the hand to receive were the same in that case, even at the time that limitation commenced to run.

The only provision that can be called to aid in support of the decision under notice is, so far as we can see, S. 18 of the Limitation Act. Under that section, it would be open to question whether fraud concealing the right to sue or make an application, subsequent to the accrual of the right to sue or make the application can really avail the plaintiff or the applicant. In this case, there was no fraud when the right to apply accrued, *i. e.*, during the father's lifetime. Whether the fraud of the judgment-debtor after his death practised upon his infant son leading to the appointment of the judgment-debtor as guardian will entitle the infant to rely on S. 18 is a

1. (1913) I L R 35 A 227 (P C). 2. (1907) I L R 31 Bom 418 at 429.

difficult question, as authority in England under the analogous provision, S. 26 of 3 & 4 Will. IV, c. 27, is against such a view. See *Willis* v. *Earl Howe* (3) ; cf. *Byjnath Suhaye* v. *Brohmo Deo Narain* (4) ; and the late Mr. Mitra took the same view under the Indian Act as well. It must, however, be said that the language of the English enactment is not identical with that of S. 18 of the Limitation Act and Mr. Rustomji is of opinion that even fraud subsequent to the accrual of the cause of action will come within S. 18. *See* Rustomji's *Law of Limitation*, 3rd Edition, p. 117. We would, however, submit that the words of the section that " the time limited for instituting a suit or making an application shall be computed from the time when the fraud became known, etc." would seem to suggest the case of fraud at the inception ; otherwise time will be extended each time there is fraud subsequent for the full length of the prescribed period on each occasion.

Again, it is by no means easy to say whether the section has any application to cases whether owing to the deficiency of understanding as in the case of minors or lunatics, they are not able to protect themselves against strangers. It is possible to argue that their only protection is under S. 6 of the Limitation Act, which obviously cannot apply to this case, as it contemplates only cases of initial disability. Indeed, there is the high authority of Page Wood, V. C. in *Manby* v. *Bewicke* (5) to the effect that the corresponding section of the English Act does not apply to cases of persons of defective understanding.

Again, if the case under notice is covered by S. 18, the learned Judges should have held that the minor had a fresh period of three years under the section after the fraud of the former guardian became known and not merely that his period of guardianship should be deducted in the computation of time under Art. 182.

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3. (1893) 2 Ch 545 at 553. 4. (1868) 9 W R 255.
5. 3 K & J 342.

NARAYAN GANESH *v.* SAGUNABAI, I. L. R. 49 Bom. 113.

The question that arose in this case is comparatively simple. A father and son were some of the members of a larger joint Mitakshara family and were as such entitled to one-third share in a house. A money decree was obtained against the father who appealed against it. Pending the disposal of the appeal, the father died; and the son prosecuted the appeal as the legal representative. The decree of the Lower Court was confirmed in appeal; and the question was whether only the sixth share of the father or the third share which originally belonged to the father and the son was liable for the decree. The learned Judges had no difficulty in holding that the latter contention was right, relying on the prior decisions in *Umed Hathising* v. *Goman Bhaiji* (1) and *Shivram* v. *Shakaram* (2); and they held that the provisions of S. 2, Bombay Act VII of 1866 did not lay down anything to the contrary. Whatever doubts might have existed prior to the Code of 1908, there can be no difficulty, after the enactment of S. 53 in the new Code, of reaching the joint family assets of the father and son in execution. The question would have been more difficult if, in this case, there had been a partition between the father and son after the accrual of the cause of action for the suit against the father or even after the suit and prior to the decree of the first Court. It would probably be that in such a case if there had been no appeal by the father, only the father's one-sixth share would be liable in execution, as the father's right to sell the son's share for his own debts would then not be exercisable. See *Krishnaswami Konan* v. *Ramaswami Aiyar* (3). But even then a separate suit might lie against the son after partition to reach his share which he got in partition although the partition might be *bona fide* and not made with a view to defraud the creditors of the father. *Jagannatha Rao* v. *Viswesam* (4) differing from *Kani Venkata Reddi* v. *Chelluri Sathyanarayanamurthi* (5). It would be a question whether the later suit should be based on the original cause of action against the father or the decree debt against the father or either of them at the creditor's option. See *Periasami Mudaliar* v. *Seetharama Chettiar* (6). If, however, the father after partition

1. (1895) I L R 20 B 385.
2. (1908) I L R 33 B 39.
3. (1899) I L R 22 M 519 : 9 M L J 127.
4. (1924) I L R 47 M 621.
5. (1920) 40 M L J 473.
6. (1903) I L R 27 M 243.

appealed against the decree and died pending appeal and the son comes on record as legal representative and prosecutes the appeal and the decree of the Lower Court is confirmed, it would be open to argument whether the son's share in the partition may not be reached in execution of the appellate decree against the son or whether even in such a case a fresh suit should be brought against the son to reach his share as distinguished from his father's share. Other considerations might arise if after such a partition, the son and the father were both alive and the son's share is sought to be made liable for the decree against the father. Whether a second suit can be brought against the son in the father's lifetime and, if so, whether on the original cause of action or on the decree debt and whether such a suit may be brought against the son alone without the father being a party are more difficult questions to answer. Cf. *Narayana Chetti* v. *Virappa Chetti*(7).

SHANKERBHAI MANORBHAI *v.* MOTILAL RAMDAS, (1925) I. L. R. 49 Bom. 118.

Notwithstanding the high authority of the learned Judges who decided *Kali Dayal Bhattacharjee* v. *Nagendra Nath Pakrashi* (1) it will be open to a Court which is not concluded by that decision, to consider whether the sounder rule is not as has been held in the case under notice, that where all the tenants-in-common sue to eject a stranger from the land and obtain a decree and the defendant appeals therefrom and pending the appeal one of the tenants-in-common dies and his legal representatives are not brought on the record, the appeal does not thereby become so defective in respect of parties as to render it impossible for the Appellate Court to give any relief to the defendant-appellant. In this connection we may mention that it is open to one of several tenants-in-common to sue alone to eject a trespasser, so long as the tenant-in-common does not deny the title of the other co-tenants. *Radha Proshad Wasti* v. *Esuf* (2), *Shutari* v. *The Magnesite Syndicate, Ltd.* (3) and *Sri Thakurji* v. *Hari Lal* (4). If, in such a case, the plaintiff obtains a decree and the defendant appeals against the same and the plaintiff dies pending the

7. (1916) 31 M L J 386.
1. (1919) 24 C W N 44.
2. (1881) I L R 7 C 414. 3. (1915) I L R 39 M 501. 4. (1922) I L R 44 A 634

appeal and his legal representatives are not brought on the record, the case presents no difficulties and the appeal as a whole will abate. But where each tenant-in-common sues in respect of his share, it is not clear why it is not open to the Appellate Court to give the appropriate relief against the surviving tenant-in-common in respect of that fraction of the interest represented by him. We are not sure whether it is not open to the defendant in such a case to acquiesce in the decree in so far as one of the tenants-in-common is concerned and appeal against the decree against the other or others, as for instance, when he compromises with one or some of them. If this is possible, there can be no objection to the appeal proceeding to an adjudication on the merits, if after appeal, one of the respondents, tenants-in-common, dies and his legal representatives are not brought on the record. It may be that in such a case, if the defendant-appellant succeeds, he will only get joint possession along with the legal representatives of the deceased respondent in respect of the shares of the surviving respondents. If, notwithstanding the abatement as against the deceased respondent, the Appellate Court thinks the presence of his legal representatives is necessary to adjudicate on the rights of the other parties, there is nothing to prevent the Appellate Court at the time of the hearing to order them to be made parties to the appeal for that limited purpose under O. 1, R. 10. or O. 41, R. 20. It may be that the case of joint promisees under a contract may stand on a different footing as they have all to join together in suing on the contract. See S. 45 of the Contract Act ; and the case of *Azimuddin* v. *Tara Sanker* (5), which depends upon the language of S. 188 of the Bengal Tenancy Act, will also stand on a different footing. The case of joint tenants in the strict sense of the terms is really simple, as on the death of one of the joint tenants, his interest survives to the others and there is thus no scope for the application of O. 22, R. 4 (3). In the consideration of this question, cases prior to the coming into force of the Code of 1908 are not certain guides, as they are to some extent coloured by the application of S. 368 of the Code of 1882 as it stood at the time. Cf. *Hem Kunwar* v. *Amba Prasad* (6).

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5. (1918) 28 C L J 201. 6. (1900) I L R 22 A 430.

HEM CHANDRA DE SARKAR *v.* AMIYABALA DE SARKAR, (1925) I. L. R. 52 Cal. 121.

That in a suit for specific performance when a defendant pleads that he is a *bona fide* purchaser for value of the property without notice of the contract sued on, the burden of proving absence of notice is on the defendant is too well settled at the present day under the decisions referred to in the case under notice, to admit of any doubt. We only wish to draw attention to the nature of the plea in the words of Farwell, J., as he then was, in the well-known case of *In re, Nisbet and Potts' Contract* (1) following the decision of the Court of Appeal in *Attorney-General* v. *Biphosphated Guano Company* (2). His Lordship observed, "But the plea of purchaser for value without notice is a single plea to be proved by the person pleading it ; it is not to be regarded as a plea of purchaser for value, to be met by a reply of notice, " and reference is made to the observations of the Court of Appeal that the defence of a purchase without notice is one which ought to be specifically alleged as well as proved by those who rely on it.

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1. (1905) 1 Ch 391 at 402. 2. 11 Ch D 327.

LATCHMANAN CHETTY *v.* SUBBIAH CHETTY, (1924) I. L. R. 47 M. 920 : 47 M. L. J. 389.

Under the Limitation Act of 1877, S. 7 applied to decree but S. 8 did not. According to the interpretation put upon S. 7 by the Madras High Court, that section did not apply unless all the persons entitled to institute the suit or make the application were minors. The present Act gives the benefit of S. 8 (present S. 7) to minor decree-holders but the alteration has been made so ineptly, if the conclusion arrived at in this case is correct, that there is no case which would come within the main clause—all cases of decree would come only within the exception. The cases that came to the contrary conclusion relied upon some arguments which are clearly invalidated by the decision of the Privy Council in *Ganesha Rao* v. *Tuljaram Rao* (1). Mr. Justice Walsh suggests in *Singa Pillay* v. *Govinda Reddy* (2) "that Ss. 6 and 7 are dealing not with procedure but with the legal status of individuals and the expression 'where a discharge can be given' is merely intended in S. 7 to be a definition of a person who in the ordinary legal language is described as being able to give a discharge."

KOYASAN KOYA HAJI *v.* SECRETARY OF STATE FOR INDIA, I. L. R. 47 M. 927 : 47 M. L. J. 379.

The Madras Land Encroachment Act has been always a difficult Act to construe. S. 14 of the Act says : "Nothing contained in this Act shall be held to prevent persons deeming themselves aggrieved by any proceedings under this Act except as hereinbefore provided from applying to the Civil Courts for redress : Provided that the Civil Courts shall not take cognizance of any suit instituted by such persons for any such cause of action unless such suit shall be instituted within six months from the time at which the cause of action arose" and the explanation says that the cause of action shall be deemed to have arisen (*a*) in respect of any assessment or penalty on the date on which such assessment or penalty is levied ; and (*b*) in respect of eviction or forfeiture on the date of eviction or forfeiture. Several questions have arisen in connection with the section. One of them is, what is meant by proceedings ? Do notices under S. 6 or 7 constitute such

1. (1913) I L R 36 M 295 : 25 M L J 150 (P C).
2. (1917) I L R 41 M 435 at 442.

proceedings or is it only levy of assessment or penalty or eviction that constitutes *proceedings* under the section and gives rise to a cause of action ? Somewhat similar questions have been raised with reference to notices under the Revenue Recovery Act. So far as the Land Encroachment Act is concerned, in *Narayana Pillai* v. *Secretary of State* (1) the view was taken that a notice was not a proceeding under the Act. The referring Judges in *The Secretary of State for India* v. *Assan* (2) were inclined to take this view. The Full Bench differed and held that if the notice was claimed as giving rise to a cause of action, the suit would be barred after six months. The Full Bench at the same time agreed with the judgment in *Narayana Pillai* v. *Secretary of State* (1) that a mere notice under S. 7 was no grievance and gave rise to no cause of action at all. In so doing they purported to differ from *Bhaskaradu* v. *Subbarayadu* (3) which the Judges seemed inclined to hold that a notice would give rise to a cause of action. But the notice in that case was a notice under S. 6. The notice under S. 6 differs from that under S. 7 in that it involves a denial of title of the person to whom it is addressed. The facts in the case under review were these : First, there was a notice to quit under S. 6 but no further action was taken. An application for review was filed by the party which was rejected and he was asked to vacate the land. This the plaintiff made the ground of his suit and sued. At the time it was more than six months from the first notice to quit. The question was whether the suit was not barred.The view expressed is that though it may be that the first notice gave a cause of action the party is not limited to it and when a further cause of action arises in the nature of an order to vacate, he has a cause of action again. It has been held before this that though penalty has been once levied, if later on, penalty should again be levied the party has a fresh cause of action in and similarly though levy of penalty has been acquiesced in, when eviction takes place, the party may sue again so long as his title is not destroyed by adverse possession [see *Bhaskaradu* v. *Subbarayadu* (3) and *Syed Mamshah Thaika* v. *Secretary of State* (4)]. This case goes further

1. (1912) 23 M L J 162.
2. (1925) I L R 39 M 727 : 30 M L J 255 (F B).
3. (1913) I L R 38 M 674 : 26 M L J 60.
4. (1918) 9 L W 265.

than these cases and as Mr. Justice Ramesam recognises is in conflict with those cases that hold that when there are repeated denials of title, the suit must be brought within six years of the first denial and each fresh denial does not give a fresh cause of action. On that subject, there are any number of conflicting rulings and this case is another.

RAJARATHNAM NAIDU *v.* RAMACHANDRA NAIDU, I. L. R. 47 M. 948 : 47 M. L. J. 434.

It is hardly a satisfactory procedure to distinguish a decision on the facts when the reasoning proceeds on a different assumption as to the facts. We think the judgment in this case is open to that objection and would have been clearly opposed to the *ratio decidendi* of the decision in *Vaidyanathaswami Aiyar* v. *Somasundara Mudaliar* (1), were it not for the changed language of the Civil Procedure Code of 1908. The Full Bench is clear that an order for sale in a mortgage suit is a decree for payment of money within the meaning of Ss. 230, 258 and 295 of the old Code. S. 230 (present S. 48) contained the words "decree for payment of money." In S. 258 (present O. 21, R. 2), the words were " money payable under a decree. " In S. 295 the words were " decrees for money. " Their Lordships considered that sound policy required that in all these cases, even a decree directing sale in default of payment as in a mortgage decree should come within those sections and they further held that the language permitted of such an interpretation. The Legislature has since altered the language of these sections very considerably. S. 48, Civil Procedure Code of 1908 (corresponding to old S. 230) has been expressly made applicable to all decrees except decrees for injunction. In O. 21, R. 2 (which corresponds to S. 258), the words " where any money payable under decree of any kind " have been substituted. In S. 73 (old S. 295) the words " decrees for the payment of money passed against the same judgment-debtor " are substituted for the words " decrees for money. " In S. 232 of the old Code (which corresponds to O. 21, R. 16) the words were " decrees for money. " In place of those words we have now the words " decrees for payment of money. " The net result is that we have now one uniform style " decree for payment of money " and all ambiguity in Ss. 230 and 258 is removed by using apt expres-

1. (1904) I L R 28 M 473 : 15 M L J 126.

sions for the purpose. The question is, what is the object of the change? Is it to perpetuate the view taken in *Vaidianadasami Aiyar v. Somasundaram Pillai* (1) as the proper interpretation of the words "decree for payment of money" or was it to narrow it? As to this, we have a clear guide, we think, in another section of the Code. O. 21, R. 30 prescribes the mode of execution of *decrees for payment of money*. It says: "Every decree for the payment of money including a decree for the payment of money as the alternative to some other relief may be executed by the detention in the civil prison of the judgment-debtor or by the attachment and sale of his property or by both." This, we think, makes it perfectly clear that only decrees that are capable of execution in the manner indicated are intended to be designated "decrees for payment of money." The wording of S. 254 of the old Code which corresponds to this rule was: "Every decree or order directing a party to pay money as compensation or costs or as the alternative to some other relief." Till we get to *such a decree* we have no decree for payment of money. In mortgage suits, for instance, the Code provides: "Where the net proceeds of any such sale are found to be insufficient to pay the amount due to the plaintiff, if the balance is legally recoverable from the defendant otherwise than out of the property sold, the Court may pass a decree for such amount" (O. 34, R. 6)—mark "a decree" and not merely an order—clearly indicating that the decree passed under that rule is the decree for payment of money and not the earlier decree for sale.

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1. (1905) I L R 28 M 473 : 15 M L J 126 (F B).

RAJANI KANTA BAG *v.* RAJABALA DASI, I. L. R. 52 Cal. 128.

The points discussed in this case are subjects of great conflict of authority in the various High Courts. If the question as to the proper Court-fee payable in a suit for partition of joint family properties where the plaintiff alleged he was in joint possession of the properties at the time of suit, were to arise in Madras, it would have been decided following *Rangiah Chetty* v. *Subramania Chetty* (1) that the plaintiff was entitled to value the suit as he pleased under S. 7 (*iv*) (*b*) of the Court Fees Act. But this view has not been shared in by all the High Courts, especially by the Calcutta High Court, whose decisions have been expressly not followed by the Madras Full Bench. *Vide* also *Dagdu* v. *Totaram* (2). In the case of such a suit in Madras the jurisdiction of the Court to try it would depend merely on the plaintiff's valuation for the purpose of Court-fees under S. 8 of the Suits Valuation Act. See *Ramayya* v. *Ramaswami* (3).

On the question, again, whether in a suit for partition, the jurisdiction to try it is determined by the value of the share which the plaintiff claims or the entire value of the properties sought to be divided, all the High Courts except the Calcutta High Court are unanimous in the view that it is only the value of the plaintiff's share that determines the value of the suit for the purposes of jurisdiction. *Chinnaswami Pillai* v. *Karuppa Udayan* (4), *Velu Goundan* v. *Kumaravelu Goundan* (5), *Motibhai* v. *Haridas* (6), *Dungar Mal* v. *Jai Ram* (7) and *Dukhi Singh* v. *Harihar Shah* (8). On the other hand, the Calcutta High Court has held in *Lala Bhugwat Sahay* v. *Rai Pashupati Nath Bose* (9) and *Biraj Mohini Dasi* v. *Chintamoni Dasi* (10) which the learned Judges in the case under notice have followed that it is the value of the entire properties and not of the plaintiff's share alone that determines the jurisdiction of the Court competent to try the suit. Although ordinarily it is the value of the

1. (1910) 21 M L J 21 (F B).
2. (1909) I L R 33 B 658.
3. (1912) M W N 199.
4. (1896) I L R 21 M 234.
5. (1896) I L R 20 M 289 : 7 M L J 30.
6. (1896) I L R 22 B 315.
7. (1902) I L R 24 A 377 at 381.
8. (1920) 5 Pat L J 540.
9. (1906) 10 C W N 564.
10. (1906) 10 C W N 565 (footnote).

relief sought by the plaintiff that determines the forum, there is some difficulty in its application to partition suits because, as it is sometimes said, in a partition suit, each one of the parties is a plaintiff and a defendant ; and it is open to each one of the defendants to demand and obtain his share in that suit itself. If this is the true nature of the suit, it is possible that though the value of the plaintiff's share may be within the jurisdiction of a Court, that Court may be incompetent to adjudge upon the share of a defendant whose value may be beyond its pecuniary limits if he came in as a plaintiff. If in such a case, the Court of smaller pecuniary jurisdiction can award to that defendant his share or whether he should be driven to a different suit for that purpose is a somewhat difficult question. If he has to bring a separate suit for the purpose in a higher Court, anomalous results are possible by any inconsistent decision of the later Court as there can be no question of *res judicata* in the higher Court. This difficulty is obviated by the view of the Calcutta High Court that it is the value of the entire properties that determines the jurisdiction to try the suit.

We are not sure whether the judgment of Chakravarthi, J. has been correctly reported at page 136 where the learned Judge is reported to have observed that an *ad valorem* Court fee is payable in some cases under Sch. II, Art. 17 (*vi*) of the Court Fees Act, as the second schedule to the Act, so far as we have been able to see, only deals with cases where fixed fees are payable.

On the question of the interference of the High Court under S. 115 of the Civil Procedure Code, it is impossible to reconcile the decisions of the same High Court and much more so of the various High Courts. It is, however, permissible to mention that the practice of interfering at an interlocutory stage of the suit by the High Court on questions of Court-fee is common in Madras [see *Sudalaimuthu Pillai* v. *Peria Sundaram Pillai* (11)] and the party is not forced to resort to the remedy of an appeal at a later stage. The exact question decided in the case under notice is covered by *Atchayya* v. *Sri Seetharamachandra Rao* (12).

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11. (1925) 48 M L J 514. 12. (1912) I L R 39 M 195 : 24 M L J 112 (F B).

EMPEROR *v.* KASHIRAM, I. L. R. 46 All. 906.

This case is interesting as making an attempt to indicate the difference between a report and a charge. The word "charge" should not be taken in a very technical sense [*The Sessions Judge of Tinnevelly Division* v. *Sivan Chetti* (1)] but it must amount to an *accusation* made to a person entitled or bound to investigate or take any step with respect to it, with a view that such step may be taken or such investigation may take place. [See *The Sessions Judge of Tinnevelly Division* v. *Sivan Chetti* (1)]. Mere suspicion does not amount to a charge. [See *In re, Ganapathi Bhatta* (2)]. Nor a statement under S. 162 in the course of investigation by the police in answer to questions by the investigating officer [*Chinna Ramana Gowd* v. *Emperor* (3)] for then an intention to initiate proceedings cannot be attributed to him for the proceedings have already commenced. Even if they have not commenced, if the investigation does not start at a party's instance and he only answers questions put by the police, it is impossible to regard him as making a charge. Between such a case and a case like the present which started with a mere indication of suspicion but later on developed into a charge when an accusation was made against a particular person—in the course of search possibly in answer to questions by the police, the line is very thin but it may not be very difficult to decide on the facts as to on which side each case falls. If the proceedings have started against a particular individual already, statement made in the course of the inquiry would not *prima facie* be a charge. But if no proceedings have been started, there is more room for regarding statements made, especially voluntary statements though not in form accusations, in substance charges or accusations, especially when the party is interested in the conviction. Another point decided in this case is that a charge against *A, B* and *C* followed up by proceedings in Court against *B* and *C* alone cannot be said to be a false charge in relation to a proceeding in Court. Another view was taken in *Emperor* v. *Hardwal Pal* (4). Having regard to the provision in S. 195, cl. (4) that the sanction need not name the accused there was good reason in support of the position that the word "offence" in the sec-

1. (1909) I L R 32 M 258 at 262.
2. (1911) I L R 36 M 308 at 310 : 24 M L J 463.
3. (1908) I L R 31 M 506 : 18 M L J 573.
4. (1912) I L R 34 A 522.

tion has reference not to the persons—but the specific breach of the penal law generally without reference to the *persona* of the perpetrators. If so, when *A, B* and *C* are charged with the same offence in the sense of the particular set of facts which constitute the offence, the mere fact that the case of *B* and *C* alone goes to Court does not make it any the less an offence in relation to a proceeding of the Court. In those circumstances, the splitting of the report was "splitting of hair as well of the report" as their Lordships say. Now, clause (4) has been omitted. What its effect should be, has not been the subject of consideration, at any rate not in this case, which refers neither to the clause nor its omission.

But we do not see how the charge to the police should not be taken separately from proceedings in Court and charged without sanction or complaint of the Court. That is apparently the conclusion in this case.

MOAZZAM ALI *v.* RAZA ALI, I. L. R. 46 All. 856.

There is much loose thinking about the competency of awards and compromises in the case of charities though the strong language employed in this case cannot be said to aid clarification. A clear distinction ought to be made between first private rights in relation to them and the rights of the public; secondly, between adjudications proper and framing of schemes or such other exercise of special and exclusive jurisdiction of Courts. If the question is one which comes exclusively within S. 92, Civil Procedure Code, it must be incompetent to parties to decide such questions by arbitration or compromise. On the other hand, rights of management are private rights, and *prima facie* in respect of them it must be open to parties to deal with them by both these means, though of course, it would not be open to the parties in the guise of a compromise to defeat public policy against alienation of offices, etc. *Sundarambal Ammal* v. *Yogavana Gurukkal* (1), *Nilakandan* v. *Padmanabha* (2) and *Nilakandan Nambudripad* v. *Padmanabha Revi Varma* (3). Again in respect of the property of the temple or as to the usage of the temple or as to appointment to office not coming within

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1. (1914) I L R 38 M 850 : 26 M L J 315.
2. (1890) I L R 14 M 153. 3. (1894) I L R 18 M 1 : 4 M L J 233 (P C).

S. 92, a compromise is apparently not inadmissible, but it is liable to be set aside or disallowed if it is found to constitute a breach of trust on the part of the trustee or appointer. *Sankaralinga Nadan* v. *Rajeswara Dorai* (4), *Nataraja Thambiran* v. *Kailasam Pillai* (5) and *Arunachalam Chettiar* v. *Velappa Thambiran* (6). As observed by Sadasiva Aiyar, J. in *Adwaita Prasad* v. *Baldeo Das* (7) it is necessary that the Courts should scrutinise awards and compromises with great care before they are accepted. In a recent case before the Privy Council the point whether the award was not bad as it related to public charities was set forth as a serious point by the Privy Council. [See *Ramlal Hargopal* v. *Kishanchand* (8)].

MANIKYAMBA *v.* MALAYYA, I. L. R. 47 M. 942 : 47 M. L. J. 393.

Their Lordships in this case notice a conflict between S. 6, Explanation, of the Estates Land Act and S. 8 of the same Act. A man holding kudivaram right in a portion of the estate was granted a darmilla inam. The question was—Did the new interest merge so as to make the lessees ryots or did the explanation apply and leave the parties where they were ? Their Lordships held the latter.

The Full Bench in *Marina Veeraswamy* v. *Boyinapalli Venkatrayadu* (1) held two things : (*i*) that the grantee in that case did not own an estate or part thereof ; and (*ii*) he was not a person entitled to collect *rents*—as he was himself a ryot at the time of the grant. The former view is inconsistent with the judgment of the Full Bench in *Brahmayya* v. *Achiraju* (2). The Bench in this case says the latter is not touched by the later Full Bench. The later Full Bench undoubtedly did hold that a grantee of both warams by way of darmilla inam was both part *owner* of the estate and a person entitled to collect the rent. The curious result of the later Full Bench is that the unanimous judgment of five Judges has been practically overruled in part at least by three Judges. We agree with

4. (1908) I L R 31 M 236 : 18 M L J 387 (P C).
5. (1920) I L R 44 M 283 :39 M L J 98 (P C).
6. (1915) 28 M L J 410.
7. (1916) 4 L W 587.
8. (1923) I L R 51 C 361 : 46 M L J 628, (P C).
1. (1920) 39 M L J 225 (F B).
2. (1922) I L R 45 M 716.

the Bench in this case, that it does not necessarily involve the result of overruling the earlier case—even where the grantee is already a kudivaramdar. The theory of the Act is, that the Zamindar's interest is a right to collect rents. Any transfer of that interest is a transfer of the interest to collect rents. When a man is already a tenant and there is a partial release of the right of the Zamindar, the Full Bench is of opinion that it is not a transfer of right to collect rent but a partial release of the landlord's right. This is practically to say that S. 8 applies only to cases where the landlord acquires the kudivaram interest and not where the landlord's interest is transferred to the kudivaramdar. It is hoped that the Legislature will intervene and resolve the enormous doubts and difficulties that have arisen in the application of the Act.

[END OF VOLUME XLVIII.]